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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981-1982

NO. 81-693

HULLINGHORST INDUSTRIES, INC.

Petitioner,

VERSUS

DAVID E. CARROLL

AND

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
UNITED STATES DEPARTMENT OF LABOR

Respondents.

MOTION TO PROCEED IN OPPOSITION
TO WRIT OF CERTIORARI IN FORMA PAUPERIS

NOW INTO COURT, through undersigned counsel, comes Respondent, David E. Carroll, and moves this Honorable Court for leave to file the attached Opposition to Writ of Certiorari in Forma Pauperis pursuant to 28 U.S.C. §1915, for the reasons more fully set forth in the attached Affidavit in Support of Motion to Proceed in Forma Pauperis. No leave to proceed in forma pauperis has been sought in any Court below.

O R D E R

Considering the foregoing,

IT IS ORDERED that Respondent, David E. Carroll, be allowed to oppose the above captioned Writ of Certiorari in forma pauperis.

JUSTICE OF THE
UNITED STATES SUPREME COURT

Respectfully submitted,

MARTZELL, MONTERO & LAMOTHE

BY: Charles F. Gay Jr.

CHARLES F. GAY, JR.
338 Lafayette Street
New Orleans, LA 70130
(504) 581-9065

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AND

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

RESPONDENTS.

AFFIDAVIT IN SUPPORT OF
MOTION TO PROCEED ON OPPOSITION
TO WRIT OF CERTIORARI IN FORMA PAUPERIS

I, David E. Carroll, being first duly sworn, depose and say that I am the Respondent in the above entitled case; that in support of my Motion to Proceed on Appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe that I am entititled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of opposing the Writ of Certiorari filed by Petitioner herein are true.

1. Are you presently employed?

   a. No.

   b. Date of last employment: December 12, 1972; Wages at that time: Approximately $731.24/month

2. Have you received within the past 12 months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   a. No.

3. Do you own any cash or checking or savings account?

   a. No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   a. Real estate: Yes, my home;

   Stocks: No;

   Bonds: No;

   Notes: No;

   Automobiles: Yes, one 1974 Oldsmobile and one 1978 GMC pick-up truck;

   Other valuable property: No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   a. Delphia Carroll - husband

   David E. Carroll, Jr., - father

   Henry O. Carroll - father

   Kathryn R. Carroll - father

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

David E. Carroll

DAVID E. CARROLL

Sworn to and subscribed
before me, Notary, this
29 day of October, 1981.

NOTARY PUBLIC

O R D E R

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

JUSTICE OF THE
UNITED STATES SUPREME COURT

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981-1982

NO. 81-693

HULLINGHORST INDUSTRIES, INC.,

Petitioner,

versus

DAVID E. CARROLL
AND
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR

Respondents.

OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHARLES F. GAY, JR.
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Attorney for David E. Carroll

OPPOSITION TO HULLINGHORST INDUSTRIES' WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent, David Carroll, opposes Hullinghorst Industries' Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit reported at 650 F. 2d 750. In support of this opposition, respondent would show that this case does not warrant invocation of this Court's discretionary jurisdiction.

ISSUE

Are there "special and important reasons" warranting the exercise of this Court's judicial discretion in granting Writs of Certiorari in this case?

ARGUMENT

Rule 17 of the Rules of the Supreme Court of the United States establishes the standard to be used by this Court in considering an application for Writs of Certiorari. The standard is a demanding one, requiring a showing of both special and important reasons before such a review will be granted. It is respectfully suggested that this case satisfies neither of these criteria and the instant Petition for Writs of Certiorari should, accordingly, be denied.

What constitutes special and important reasons which would allow exercise of the Court's discretion? Rule 17 provides some insight. Although not explicitly limiting the instances in which the Court will grant certiorari, the rule sets out seven examples of the character of reasons that will be considered:

1. When a federal court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter;
2. When a federal court of appeals has decided a federal question in a way in conflict with a state court of last resort;

3. When a federal court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for exercise of the court's power of supervision;

4. When a federal court of appeals has so far sanctioned such a departure by a lower court as to call for the exercise of the court's power of supervision;

5. When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals;

6. When a state court or federal court of appeals has decided an important question of federal law which has not been but should be settled by this court;

7. When a state court or federal court of appeals has decided a federal question in a way in conflict with applicable decisions of this court.

Additionally, certain cases have suggested two further grounds for invocation of this Court's certiorari jurisdiction:

8. When the case involves significant constitutional questions;

9. When the case involves an issue of substantial public interest.

See: U.S. V. Nobles. 95 S. Ct. 2160, 422 U.S. 225, 45 L. Ed. 2d 141 (1975)

It is suggested that this case satisfies none of the above criteria and that the instant Petition for Writ of Certiorari must therefore be denied.

Petitioner would have this Honorable Court believe that the decision of the Fifth Circuit Court of Appeals is in direct conflict with other circuit courts of appeal in its construction of the coverage provisions of the Longshoremen and Harbor Workers' Compensation Act. However, there is in fact no language in the Fifth Circuit's opinion which conflicts with any of the cited cases. Indeed, the opinion in question specifically adopts the very test for maritime employment affirmed by this Court in Jacksonville Shipyards Inc. v. Perdue, 539 F. 2d 533, 539-40 (5th Cir. 1976) vacated and remanded in part sub nom. P.C. Pfeiffer Company, Inc. v. Ford, 433 U.S. 904, 97 S. Ct. 2966, 53 L. Ed. 2d 1088 (1977), reaff'd on remand, 575 F. 2d 79 (5th Cir. 1978) (per curiam), aff'd sub nom P.C. Pfeiffer Companpy, Inc. v. Ford, 444 U.S. 69, 100 S. Ct. 328, 62 L.Ed. 2 225 (1979):

> [A]n injured worker is a covered "employee" if...(a) he was performing the work of loading, unloading, repairing, building, or breaking a vessel, or (b) although he was not actually carrying out these specified functions, he was "directly involved" in such work.

In affirming the decision on remand of the Administrative Law Judge and Benefits Review Board, the Fifth Circuit Court of Appeals specifically accepted the finding that respondent, David Carroll, was directly involved in the work of loading and unloading vessels at the time of his injury. At page 10 of its Petition for Writ of Certiorari, petitioner suggests that the Fifth Circuit "concluded that because Carroll's work involved his presence in the 'situs' area and because it tangentially involved a pier, he was therefore engaged in maritime employment". However, a careful reading of the opinion provides no support for such a statement and actually proves it to be a serious mischaracterization of the court's holding. Indeed, a thorough review of the opinion of the court of appeals demonstrates that the Fifth Circuit panel correctly concluded, from the record before it, that the work which David Carroll was engaged in at the time of his injury (erection of a scaffold for the sole purpose of repairing a piece of longshoring equipment) was an integral part of the repair of that equipment and hence that David Carroll was "directly involved" in maritime employment.

Construction of statutory language is seldom an easy task. Nor is the Longshoremen and Harbor Workers' Compensation Act any exception. However there is no support

for petitioner's assertion that the appellate court's holding ignores and abrogates the language of the Longshoremen and Harbor Workers' Compensation Act by extending coverage "to employees who are beyond the scope of both the express language of the statute and congressional intent." Such a conclusion fails altogether to consider the "direct involvement with maritime employment" tests approved by this Court. Petitioner refuses to recognize that the scaffold in question didn't just "happen" to be located on a pier. It was being constructed for the specific and sole purpose of repairing a turntable used to load and unload ships. Under numerous cases interpreting the 1972 Amendments to the Longshoremen & Harbor Workers' Compensation Act, coverage has been provided to persons repairing, sandblasting, even painting longshoring equipment. Why should respondent David Carroll be treated any differently?

As a final "ground" for granting certiorari in this case, petitioner suggests that the appellate court's opinion in this case totally ignores the "employer" test under the Act. Of course, there are no reported appellate cases recognizing such a separate independent test. The reason for this phenomenon is rather obvious. In most instances, an employer has more than one employee performing a particular type of work. It would be a rare case in

which only one employee of a given employer was engaged in work qualifying as "maritime employment". Certainly, in the instant case, if this Court accepts the Fifth Circuit's holding that David Carroll was engaged in "maritime employment" at the time of his injury, then every other Hullinghorst employee involved in the erection of that scaffold was likewise engaged in maritime employment. Thus, in the instant case, Hullinghorst Industries met the "employer" test - if indeed there is such a separate requirement.

CONCLUSION

This case presents neither a conflict with an opinion of the United States Supreme Court, a conflict between the circuits, a constitutional issue or a matter of public interest. It presents an opinion of the Fifth Circuit Court of Appeals which correctly interpreted and applied the jurisdictional provisions of the Longshoremen & Harbor Workers' Compensation Act. It presents no issue justifying invocation of the discretionary certiorari jurisdiction of this the highest Court of our land.

Respectfully submitted,

MARTZELL, MONTERO & LAMOTHE

BY: Charles F. Gay Jr.

CHARLES F. GAY, JR.
338 Lafayette Street
New Orleans, Louisiana 70130
(504) 581-9065

CERTIFICATE

PARISH OF ORLEANS

STATE OF LOUISIANA

BEFORE ME, the undersigned Notary Public, personally came and appeared Charles F. Gay, Jr., who, after being duly sworn, did state:

I am a member of the Bar of the Supreme Court of the United States. I certify that on this day I have personally supervised the mailing of the original and one copy of this Opposition to Petition for Certiorari, which was deposited in a United States Post Office mail box, with first class postage prepaid and properly addressed to the Clerk of this Court. I further state that this mailing took place within the time extension granted by the Clerk to all respondents.

I further certify that a copy of this Opposition to Petition for Certiorari has been sent to each of the following individuals and/or entities by depositing said copies in a United States Post Office mail box, with first class postage prepaid and properly addressed to the following individuals and/or entities:

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Charles F. Gay Jr.
CHARLES F. GAY, JR.

SWORN TO AND SUBSCRIBED BEFORE ME, Notary Public, this 8th day of December, 1981 at New Orleans, Louisiana, before the undersigned competent witnesses.

WITNESSES:

Linnea Ludeco

Janine Syll Simerly
NOTARY PUBLIC